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No. 96-364

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1996

THE HIGHLAND IRRIGATION COMPANY, a mutual ditch company; and THE NINE MILE CANAL COMPANY, a mutual ditch company,
Petitioners,
vs.
THE PEOPLE OF THE STATE OF COLORADO, ex rel. HAL D. SIMPSON, STATE ENGINEER; and STEVEN J. WITTE, DIVISION ENGINEER FOR WATER DIVISION 2,
Respondents.

On Petition for Writ of Certiorari to
The Supreme Court of the State of Colorado

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does this Court have jurisdiction to consider the Petitioners' challenge to the validity of the 1980 Operating Plan for John Martin Reservoir when the Petitioners do not satisfy the causation and redressability elements of Article III standing?

2. Was the Colorado Supreme Court correct in holding that the Operating Plan was properly adopted by the Arkansas River Compact Administration under its Compact powers?

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STATEMENT OF THE CASE

Petitioners are two Colorado mutual ditch companies who challenged State administration of their water rights in accordance with a Resolution Concerning an Operating Plan for John Martin Reservoir adopted by the Arkansas River Compact Administration in 1980.[1] After a full trial on the

[1] This brief will use the same terminology as the Petitioners' brief: Petitioners will be referred to collectively as the "Petitioners" and individually as "Highland" and "Nine Mile"; Respondents as the "State"; the Arkansas River Compact as the

merits and extensive briefing, the water court for Colorado Water Division 2 (the Arkansas River basin) upheld the 1980 Operating Plan as consistent with the Compact. Pet. App. D & E. The Colorado Supreme Court, in a thoughtful, well-reasoned opinion affirmed. Pet. App. A. Petitioners now seek a third level of review in this Court. Neither Kansas nor its water users participated in the case.[2] Colorado water users above and below John Martin Reservoir filed amicus briefs supporting the Operating Plan.[3]

Petitioners' statement of the case omits factual findings of the water court and the Colorado Supreme Court in *Highland II* that are crucial to both the standing and

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"Compact"; the Arkansas River Compact Administration" as "ARCA"; the 1980 Operating Plan for John Martin Reservoir as the "1980 Operating Plan" or the "Operating Plan"; and the two Colorado Supreme Court decisions, *People of the State of Colorado ex rel. Simpson v. Highland Irrigation Co.*, 893 P.2d 122 (Colo. 1995) and *People of the State of Colorado ex rel. Simpson v. Highland Irrigation Co.*, 917 P.2d 1242 (Colo. 1996), as *Highland I* and *Highland II*, respectively.

[2] In *Highland II*, the Court noted that the Operating Plan is an instance of "notable accord amidst discord" between Colorado and Kansas, either one of which could discontinue it in any year. Pet. App. at 16.

[3] The following water users filed amicus briefs in support of the 1980 Operating Plan: Lower Arkansas Water Management Association, Continental Grain Company d/b/a Colorado Beef, District 67 Irrigating Canals Association, Southeastern Colorado Water Conservancy District, Fort Lyon Canal Company, and Arkansas Valley Ditch Association. The Colorado Water Conservation Board also filed a brief supporting the Plan.

merits issues.[4] For instance, the Petitioners quote less than half of finding 21 of the water court's March 8, 1994 order. Pet. at 11. The remainder of finding 21 is as follows:

> According to the deposition testimony of Dr. Jeris Danielson, former State Engineer, without the Operating Plan there would be a race between Colorado and Kansas to run the most water and run it the fastest. This race would result in the reservoir being empty during the first two weeks of April. Based on the history of John Martin Reservoir prior to the 1980 Operating Plan, there was water in the reservoir at the time of the Division Engineer's orders in this case only because the operating Plan and Amendment "B"[5] were in effect. **Without the Operating Plan**

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[4] The water court originally held that the Petitioners lacked standing to assert their affirmative defense that the Operating Plan violated the Compact. Pet App. C. In *Highland I*, the Colorado Supreme Court reversed the water court's standing determination. Pet. App. B. On remand, the water court held that the Operating Plan does not violate the Compact. Pet. App. D & E. Then, in *Highland II*, the Court affirmed the water court's decision on the merits. Pet. App. A. However, in deciding that the Operating Plan is valid, the Court considered whether it injured or benefitted the Petitioners and, while the Court did not revisit the standing issue, its findings relate to both standing and the merits.

[5] The 1984 agreement referred to by the water court as Amendment "B" is actually Agreement "B." *See* Pet. App. at 16 n. 10. Although the Petitioners emphasize that they are not signatories to Agreement "B," Pet. at 24 n. 2, 26, the Division Engineer's uncontroverted testimony established that he administers Agreement "B" for the benefit of all upstream ditches, including those of the Petitioners, Record, Vol. 5 at 227.

> **and Amendment "B" the Defendants would be called out more frequently. To allow Defendants to prevail on their affirmative defense would be detrimental to them in the long-run. Therefore, there is no redressability and no standing.**

Pet. App. at 45 (footnote and emphasis added).

In *Highland II*, the Colorado Supreme Court reviewed the trial court record and agreed that "[i]mplementation of the Operating Plan has not been to the detriment of Highland and Nine Mile," noting that the evidence showed that their diversions materially increased under the plan despite a substantial reduction in streamflow. Pet. App. at 6. The Court also stated:

> based on the record before us, we are **confident that Highland, Nine Mile, and other Colorado water users upstream from John Martin Reservoir benefit from the Operating Plan**, as do the downstream senior priorities of water district 67. In receiving benefits from Colorado's Compact participation that they would not otherwise have under Colorado law, Highland and Nine Mile cannot prevent Colorado from reasonably acting on behalf of the common good of Colorado water users in Compact administration.

Pet. App. at 22 (footnote omitted)(emphasis added).

The Colorado Supreme Court concluded:

> The court found that the Operating Plan did not deprive Highland and Nine Mile of the

> benefit of the no-call provision of the Compact but only affected its timing and the procedure for its implementation. As these findings are supported by the record and the applicable law, we will not disturb them on appeal.

Pet. App. at 24.

Petitioners' description of the Operating Plan, Pet. at 8-9, is woefully incomplete.[6] The most significant omission is the fact that, as the Colorado Supreme Court found in *Highland II*, the Operating Plan incorporates the no-call protection of the Compact:

> Under the Operating Plan, this transfer parallels in amount and duration those releases from the reservoir contemplated by the Compact. During the period of transfer into the accounts, the Colorado priority system is suspended in favor of water users upstream of the reservoir, with regard to water users below the reservoir.

Pet. App. at 4; *see also* Pet. App. at 18.

Another significant omission is the fact that the Operating Plan increases the amount of water in conservation

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[6] Petitioners devote about four times as much space to the congressional proceedings leading to Compact ratification as to the Operating Plan. Pet. at 3-8. However, the Petitioners' lengthy discussion of the historical intent to provide call-protection to water users above John Martin Reservoir is largely irrelevant, as are Appendices H, I, J, and K, because the Operating Plan preserves the Compact's call-protection.

storage and, thereby, affords longer call-protection than the Compact. Pet. App. at 22 n. 15. For a more complete description of the Operating Plan, the Court should refer to *Highland II*. Pet. App. at 1-24.

Perhaps most egregious is the Petitioners' representation that "[t]he Colorado Supreme Court has twice held that Article V-F precludes calls upstream while conservation water lies in storage." Pet. at 21; *see also* Pet. at 3 ("The Colorado Supreme Court construed the quoted sentence literally in *Highland I* .... It had earlier construed the same sentence in *S.E. Colo. Water Cons. Dist. v. Fort Lyon Canal Co.* .... "), 19. Neither of the cases cited by the Petitioners "construed" Article V-F; rather, they quoted or paraphrased that provision in the course of deciding other issues. *Highland I* was decided solely on the standing issue. Pet. App. at 35, 39. The Court remanded the case to allow the water court to decide the Compact issue, which it then did, upholding the Operating Plan.

Southeastern Colorado Water Conservancy District v. Fort Lyon Canal Co., 720 P.2d 133 (Colo. 1986), did not consider the Operating Plan at all. The Compact issue there was whether four decrees granted by the water court would cause a reduction or change in the historical pattern of return flows to the Arkansas River, which would violate the Compact. The Colorado Supreme Court noted that if the amount in the conservation pool were reduced because of the reduction in springtime return flows, the conservation pool would be depleted earlier than normal, hastening the downstream call. The case was remanded for determination of whether the reduction in springtime return flows would affect the conservation pool and, if so, whether additional conditions were necessary to assure compliance with the Compact.

Dissatisfied with the Colorado courts' findings of fact, the Petitioners seek to support their one-sided account of the Operating Plan by quoting what they deem to be the "pertinent portions" of the Special Master's Order Granting Kansas' Motion to Dismiss Colorado's Well Counterclaim in *Kansas v. Colorado*, No. 105 Original. Pet. at 13 n. 1. However, at the top of page 15, they cut off the Special Master's description of the Compact in mid-paragraph. The remainder of the paragraph states as follows:

> Obviously it is not a system that encourages restraint in water use, or calling for water only at times when it would be most useful to the crops. Water demanded by the first State to call automatically reduces the supply available to the other. According to Colorado, the result was that "both States generally demanded simultaneous releases at the maximum rates to insure that they received their share of water stored in the reservoir." Colorado's Statement of Each State's Entitlements Under the Arkansas River Compact at 55-56.

Order at 5. Moreover, the Special Master recognized that ARCA abandoned the common pool concept and adopted the Operating Plan, which established individual storage accounts, for the express purpose of more efficiently utilizing the reservoir, Order at 6, and that "witnesses for both States supported the continuation of the Plan," *id.* at 6-7 n. 1. Neither the Special Master nor this Court ruled on the Operating Plan's validity. However, the Special Master found that the plan provided benefits to both Colorado and Kansas, and this Court approved his conclusion. *Kansas v. Colorado*, 115 S.Ct. 1733, 1745 (1995).

REASONS FOR DENYING THE WRIT

Before reaching the merits this Court would need to determine if the Petitioners have standing to challenge the validity of the Operating Plan. The record below establishes that they do not because they fail to satisfy two elements of Article III standing: causation and redressability. In fact, the courts below found that the Petitioners benefit from the Operating Plan.

There are no compelling reasons to grant the petition. Petitioners strain to create the impression of a conflict between *Highland II* and prior decisions of this Court, when in fact none exists. The Colorado Supreme Court carefully examined whether ARCA had authority to adopt the 1980 Operating Plan. After considering Article V-F in relation to other relevant provisions of the Compact, the Court correctly concluded that the Operating Plan is consistent with the Compact.

I. PETITIONERS DO NOT SATISFY THE CAUSATION AND REDRESSABILITY ELEMENTS OF ARTICLE III STANDING.

Before reaching the merits, this Court would need to decide as a threshold jurisdictional matter whether the Petitioners have standing to challenge the Operating Plan's validity.

Article III of the United States Constitution limits the jurisdiction of the federal courts to "Cases" and "Controversies." *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). The doctrine of standing identifies those disputes that are appropriate for judicial resolution:

> [T]he irreducible constitutional minimum of standing contains three elements: First, the plaintiff must have suffered an "injury in fact" -- an invasion of a legally-protected interest which is (a) concrete and particularized ... and (b) "actual or imminent, not 'conjectural' or 'hypothetical'"....
> **Second, there must be a causal connection between the injury and the conduct complained of** -- the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." .... **Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."**

Id. at 560-61 (emphasis added)(citations omitted); *see also United States v. Hays*, 115 S.Ct. 2431, 2435 (1995). Each element must be supported at every stage of the litigation. *Lujan*, 504 U.S. at 561; *see also Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1012 n. 3 (1992).

The water court found that the Operating Plan benefits the Petitioners and that its invalidation would actually be detrimental to them. Pet. App. at 45. The Colorado Supreme Court also found that the Operating Plan benefits, rather than injures, the Petitioners. Pet. App. at 6, 22, 24.[7] Since the Petitioners have not suffered an injury

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[7] An obvious question is why, if the Operating Plan actually benefits them, do the Petitioners seek its invalidation. The likely answer is that the Petitioners seek an even greater benefit, hoping that the no-call provision of the Compact would be applied during the longer period that water remains in storage under the

caused by the Operating Plan (their water rights are curtailed less frequently under it) and invalidation of the Operating Plan would not provide them any redress (their water rights would be curtailed more frequently without it), they do not satisfy the "irreducible constitutional minimum of standing" to challenge the plan.

Nebraska v. Wyoming, 507 U.S. 584 (1993), did not change the law of standing. The quoted language from that case, Pet. at 24, related to the appropriate burdens of proof for a state seeking to enforce and modify an equitable apportionment decree. This Court held that the proper standard of proof for enforcing an existing right under a decree is the preponderance of the evidence standard, whereas the standard of proof for modifying the decree to create a new right is higher.[8] Moreover, that case was an action brought by one state against another state to enforce an interstate compact, not a claim by a private party that its own state had violated an interstate compact. Finally, although the complaining state was not required to show "injury," it still had to show violation of a right, which the Petitioners failed to do. Pet. App. at 18, 24, 50. Thus, *Nebraska v. Wyoming* provides no reason to depart from the long-standing, constitutionally-based principle that the complaining party must establish injury, causation, and redressabilty before a federal court will reach the merits of the claim or defense.

Operating Plan. Pet. App. at 22. The Colorado Supreme Court found that this would be detrimental to the purposes of the Compact, other water users, and priority administration. Pet. App. at 22.

[8] In *Kansas v. Colorado*, 115 S.Ct. at 1745, this Court found it unnecessary to decide whether an action to enforce an interstate compact was subject to the same standard of proof as an action to enforce a decree.

II. THE DECISION BELOW APPLIED THE CORRECT TEST IN DETERMINING THAT ARCA ACTED WITHIN ITS COMPACT AUTHORITY IN ADOPTING THE 1980 OPERATING PLAN.

In *Kansas v. Colorado*, 115 S. Ct. at 1740, the Court stated that ARCA "is empowered to '[p]rescribe procedures for the administration of th[e] Compact,'" provided that it does so "'**consistent with the provisions of th[e] Compact.**'" (Emphasis in original.) In determining the validity of the 1980 Operating Plan, the Colorado Supreme Court applied this Court's test and carefully considered whether the plan is consistent with the Compact.[9]

The Colorado Supreme Court reviewed relevant provisions of the Compact. These include Article VIII-B, which empowers ARCA to:

> (1) Adopt, amend and revoke by-laws, rules and regulations consistent with the provisions of the compact;

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[9] Petitioners argue that the Operating Plan must be tested not only against the Compact but also "against controlling judicial interpretations of the Compact," contending that "[t]he Colorado Supreme Court has twice held that Article V-F precludes calls upstream while conservation water lies in storage.... That precedent is controlling unless modified by this Court." Pet. at 21. As discussed above, until *Highland II*, the Colorado Supreme Court had never decided whether the Operating Plan is valid under the Compact. Thus, assuming arguendo that the Operating Plan must be tested against prior interpretations by the Colorado Court, the "controlling interpretation" is *Highland II*.

> (2) **Prescribe procedures for the administration of this compact: Provided, that where such procedures involve the operation of John Martin reservoir project they shall be subject to approval of the district engineer in charge of said project;**
>
> (3) Perform all functions required to implement this compact and to do all things necessary, proper or convenient in the performance of its duties.

Pet. App. at 61 (emphasis added).

The Colorado Supreme Court also recognized that Article IV-D permits the "improved or prolonged functioning of existing works" so long as the waters of the Arkansas River are not depleted in usable quantity or availability, citing *Kansas v. Colorado*, 115 S.Ct. at 1743-44. Pet. App. at 15.

Petitioners have consistently argued for an interpretation of the Compact that ignores all of its provisions except Article V-F. The Colorado Supreme Court rejected that approach. Instead, it gave effect to the plain language of Article V-F:

> **except as controlled by the operation of the preceding provisions of this paragraph and other applicable provisions of this compact,** when there is water in the conservation pool the water users upstream from John Martin reservoir shall not be affected by the decrees to the ditches in Colorado water district 67.

Pet. App. at 17 (emphasis in Court's quotation of Art. V-F).

The Colorado Supreme Court concluded that the Petitioners' construction of the Compact would not give proper regard to the emphasized language in Article V-F or other provisions of the Compact: **"These other provisions, including Article VIII, incorporated by reference into Article V, provide sufficient basis for adoption and implementation of the Operating Plan."** Pet. App. at 18 (emphasis added).[10]

The Court specifically found that "[u]tilization of John Martin Reservoir in a more efficient manner is within the purposes of the Compact" because the Operating Plan

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[10] Although the Colorado Supreme Court did not rely on it, Article IX-A is also apposite:

> This compact shall become effective when ratified by the legislature of each state and when consented to by the congress of the United States by legislation providing substantially, among other things, as follows:
>
> Nothing contained in this act or in the compact herein consented to shall be construed as impairing or affecting the sovereignty of the United States or any of its rights or jurisdiction in and over the area of waters which are the subject of such compact: **Provided, that the chief of engineers is hereby authorized to operate the conservation features of the John Martin reservoir project in a manner conforming to such compact with such exceptions as he and the administration created pursuant to the compact may jointly approve.**

Pet. App. at 65-66 (emphasis added). The language required by Article IX-A appears verbatim in the consenting legislation. Act of May 31, 1949, ch. 155, § 2, 63 Stat. 145, 152.

furthers one of the Compact's two major objectives, "realizing 'the benefits arising from the construction, operation, and maintenance of the United States of John Martin Reservoir project for water conservation purposes.'"[11] Pet. App. at 20.

Petitioners argue that *Highland II* disregards *Nebraska v. Wyoming*. Pet. at 24. As discussed above, the language quoted by the Petitioners relates to the proper standard for proving that a right established by an equitable apportionment decree was violated; it has no bearing on the substantive issue of whether the Operating Plan violates the Compact. Standard of proof simply was not an issue in this case. Petitioners did not prove that the Operating Plan violates the Compact by any standard of proof, even a preponderance of the evidence.

Petitioners also seek to show inconsistency between the Special Master's handling of the winter storage resolution in *Kansas v. Colorado* and the Colorado Supreme Court's handling of the resolution adopting the 1980 Operating Plan. Pet. at 20-21, 25. In fact, both followed a similar approach; each examined the relevant provisions of the Compact to determine if the Compact authorized the resolution in question, and each reached the correct result based on the particular resolution and Compact provisions involved. Petitioners devote much attention to the Special Master's report on the winter storage motions, Pet. App. L, but his recognition of the benefits of the Operating Plan is more to the point.

Contrary to the Petitioners' claim, the Colorado Supreme Court's opinion does not conflict with the decisions

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[11] ARCA made similar findings in the resolution adopting the Operating Plan. Pet. App. at 68.

of this Court, nor does it "validate[] ARCA's modification of the Compact, without Congressional consent." Pet. at 25. Rather, the Colorado Supreme Court, after a careful analysis of the Arkansas River Compact in its entirety, correctly held that the 1980 Operating Plan is authorized by the Compact.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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